

1989

The State of Utah v. Alan Craig Abbott : Brief of Appellant

Utah Court of Appeals

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Sumner J. Hatch; Attorney for Appellant.

R. Paul Van Dam; Attorney General; Christine F. Soltis; Assistant Attorney General; Attorneys for Respondent.

Recommended Citation

Brief of Appellant, *Utah v. Abbott*, No. 890464 (Utah Court of Appeals, 1989).

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

89-0464

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH

:

Plaintiff/Respondent,

:

v.

:

Case No. 890464-CA

ALAN CRAIG ABBOTT,

:

Defendant/Appellant.

:

Priority 2

BRIEF OF APPELLANT

Appeal of a Final Judgment from the
Second Judicial District Court
Davis County, State of Utah
Honorable Rodney S. Page

SUMNER J. HATCH - 1422
Attorney for Defendant/Appellant
72 East Fourth South, Suite 330
Salt Lake City, Utah 84111
Telephone: (801) 364-6474

R. PAUL VAN DAM
Attorney General for the
State of Utah
Attorney's for Plaintiff/Respondent
236 State Capitol Building
Salt Lake City, Utah 84114
Telephone: (801) 533-5261

DEPOSITED BY THE
STATE OF UTAH
AUG 17 1990

FILED

OCT 30 1989

COURT OF APPEALS

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Attorney General for the
State of Utah
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Telephone: (801) 533-5261

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I. JURISDICTION

This court has jurisdiction to hear the appeal in this matter pursuant to Utah Code Ann. §78-2a-3 (2)(e)(1987) granting appeals from district court in criminal cases involving a third degree felony.

II. NATURE OF PROCEEDINGS

This is an appeal from a final judgment of conviction entered in the Second Judicial District Court, Davis County, State of Utah, Criminal Case No. 6304. Defendant was convicted by a jury of Burglary, a third degree felony in violation of Utah Code Ann. §76-6-2.

III. ISSUES PRESENTED FOR REVIEW

The trial court erred in allowing appellant's prior convictions under Rule 609 (a) Utah Rules of Evidence, and allowing evidence of non-convictions on burglaries to which he had previously confessed to a Salt Lake County Detective.

IV. CONSTITUTION AND STATUTORY PROVISION CONSIDERED DETERMINATIVE

Utah Rules of Evidence 609 (1988).

V. STATEMENT OF THE CASE

Defendant was convicted of burglary a felony of the third degree, alleged to have occurred in Bountiful, Utah, on February 23, 1989, in a complex of Doctor Offices.

Dr. Taylor, a tenant of the building came out of his office at about 2:00 o'clock in the morning and saw the defendant standing in the second floor hallway near the rear exit door, and asked him what he was doing there. Defendant said he was looking for a toilet. Dr. Taylor asked if he had a key to the building and defendant held up a ring of keys.

Defendant went down the stairs and out of sight of Dr. Taylor.

Dr. Taylor turned to use the telephone but didn't have a quarter, so he went back to his office and called the police, who responded but didn't find anyone in or near the building. They found all outside doors locked and no evidence of breaking and entering. After the police finished their search of the building, they found no evidence of anything missing from the building or any of the offices. One second floor office was unlocked, but there was nothing disturbed or missing. TR 55-56, 62, 74, 75.

Dr. Taylor identified the defendant from a photo lineup. The police went to Abbott's home in Layton, Utah, on the 24th day of February, when he was told that Dr. Taylor had identified him. He admitted being in the building and told them that he was looking for a place to install a telephone. He was working for a public telephone installation company. Wendal Barnes testified that there were approximately 125 keys to the building that would unlock all four outside doors. TR 80. The keys were replaced about every two years, by giving keys to the doctors for their employees. TR 85. Greg Skordos also indicated that they were transferring telephones at the time. TR 86. Weldon Daines also testified that the keys were distributed to the Doctors for their employees and custodial personnel and that all 125 keys would fit all outside doors. Several officers testified that they found no signs of forced entry and that nothing was missing, including from the office on the second floor that was found unlocked. Ann Glasgow testified that the defendant worked for CMI, a telephone installation facility, which she manages.

Officer Glover, a Salt Lake County Deputy Sheriff, testified outside the presence of the jury regarding convictions of the defendant on burglary charged on three (3) counts and dismissal by plea bargain of some 30 other counts. His conversation was with the defendant in April or May of 1985. Before Officer Glover was called in before the jury, the court indicated he was going to allow the three (3) felonies into evidence and three (3) of the other bad acts which had previously been dismissed some four (4) years before. Defense Counsel objected to the entry of the exhibits, TR 146, and the court under Rule 402 (b) indicated he was going to allow the convictions and that under Rule 609 regarding credibility, he would also allow three (3) of the dismissed charges. Also see Rule 404. This changed Defense Counsel's procedure in requiring him to put on his client, Rule 403 also required a balancing act. See State v. Banner, 717 P.2d 1325, 1334 (Utah 1986). Factors the court should consider in balancing the probative value of a prior conviction against its prejudicial effect pursuant to 609 (a) (1) are:

- [1] the nature of the crime, as bearing on the character for veracity of the witness;
- [2] the recentness or remoteness of the prior conviction ;

- [3] the similarity of the prior crime to the charged crime, insofar as a close resemblance may lead the jury to punish the accused as a bad person;
- [4] the importance of credibility issues in determining the truth in a prosecution tried without decisive nontestimonial evidence ;
- [5] the importance of the accused's testimony, as perhaps warranting the exclusion of convictions probative of the accused character for veracity

Id. at 1334.

The court in instruction No. 26 also instructed the jury as to their consideration to prior bad acts, to which instruction Mr. Hatch made objection. The court should also consider State v. Brown, 105 Utah Adv. Rep. 25 (Ut. Ct. App. April 4, 1989); and State v. Wight, 97 Utah Adv. Rep. 27 (Ut. Ct. App. Dec. 1, 1988); and U. S. v. Brown, 409 F. Supp. 890 (D. C. NY 1976).

The defendant testified as to his entry into the building, claiming he was looking for a place to install a second lease telephone; that he had not been there on the 18th of February, 1989. In the absence of the courts ruling with regard to admissible of bad acts, counsel would not have put the defendant on the stand.

VI. SUMMARY OF ARGUMENT

Abbott's prior conviction for burglaries should not have been admissible under Rule 609 (a) (2) as there was no theft or evidence of forcible entry. Accordingly, under the criteria of Banner, supra, the prior conviction should have been excluded under Rule 609 (a) (1).

VII. ARGUMENT

APPELLANT'S PRIOR CONVICTION FOR THE SAME OFFENSE SHOULD HAVE BEEN EXCLUDED UNDER RULE 609 (a) OF THE UTAH RULES OF EVIDENCE BECAUSE ITS PROBATIVE VALUE WAS OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

Rule 609 (a) provides:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Utah Rules of Evidence 609 (a) (1989).

The trial court did not specifically articulate whether it found Abbott's prior convictions for burglary to be admissible, unless the defendant was put on the stand. As stated in State v. Wight, 97 Utah Adv. Rep. 27 (Ut. Ct. App. Dec. 1 1988). Had the court not specifically articulated whether it found Abbott's prior convictions admissible under Rule 609 (a) (1) or (2) in quoting from State v. Wight, 97 Utah Adv. Rep. 27-31, while all crimes involve in a broad sense an element of dishonesty, not all crimes necessarily involve dishonest or false statement for purposes of 609 (a) (2), State v. Wight, supra. In this case as in U. S. v. Brown, supra, the trial court made no inquiry of the underlying facts of the prior conviction nor did the state provide any background information.

A defendant who testifies on his own behalf can be impeached by evidence of his prior felony convictions not including dishonesty or false statement under Rule 609 (a) (1) only if the court determines the probative value of admitting the evidence outweighs its prejudicial effect. See State v. Banner, supra. Setting forth the factors, this court should consider in balancing the probative value of a prior conviction against its prejudicial effect pursuant to rule 609 (a) (1).

Consequently, the court found with respect to the recentness or nearness in time of the prior conviction it was directly related to truthfulness and could consider for credibility purpose. See instruction No. 26.

Citing Banner, supra:

Consideration of the testimony's prejudicial effect is especially pertinent when the witness is the defendant in a criminal prosecution This is particularly important, when, as here, the prior conviction is for the same type of crime involved in the matter under present consideration. In this type of situation, the probative value of the evidence as affecting the party's credibility will rarely outweigh the resulting confusion of the issues in dispute and the prejudice to the party.

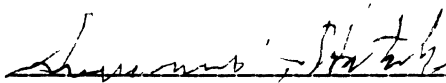
Id. at 1334 n. 44 (quoting Terry v. Zions Coop-Mercantile Inst., Utah 605 P.2d 314, 325 (1979)).

While the defendant admits that his taking the witness stand opened inquiry into his prior conviction to the matter of what the felony conviction was, but not evidence given Detective Glover with regard to three (3) of his admissions as to other crimes.

IIX. CONCLUSION

Based on the authorities presented and the almost inarguable conclusion that those crimes were evidence of bad acts, the court's ruling thereon should not be upheld by this court upon review. The trial court erred in both its improper balancing of probative value versus its prejudicial effect in its inadequacy and incorrect application of the Banner criteria. Accordingly, without the courts ruling, Abbott would not have taken the stand. The appellant seeks reversal of his conviction and a new trial, excluding the prior convictions as evidence and more particularly, the allowance in evidence before the jury, Detective Glover reciting of three (3) incidents which had been dismissed some four (4) years ago.

DATED this 30th day of October, 1989.

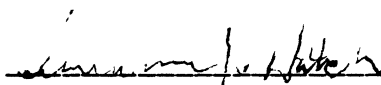


SUMNER J. HATCH
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I certify that four (4) true and correct copies of the Appellant's Brief was mailed on this 20th day of October, 1989, via first class mail, postage prepaid to:

R. PAUL VAN DAM
Attorney General for the
State of Utah
Attorney's for Plaintiff/Respondent
236 State Capitol Building
Salt Lake City, Utah 84114



SUMNER J. HATCH
Attorney for Defendant/Appellant

INSTRUCTION NO. 26

Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.

Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes.

Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

The existence of the intent which is a necessary element of the crime charged;

The defendant's presence was not the product of mistake or accident;

or as it may bear on his credibility as a witness.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider such evidence for any other purpose.